

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 12, 2006

STATE OF TENNESSEE v. REGINALD J. MCGILL

**Direct Appeal from the Circuit Court for Cheatham County
No. 14233A Robert E. Burch, Judge**

No. M2006-00891-CCA-R3-CD - Filed April 4, 2007

The appellant, Reginald J. McGill, pled guilty in the Cheatham County Circuit Court to aggravated kidnapping, and he received a sentence of twelve years incarceration in the Tennessee Department of Correction. On appeal, the appellant challenges the trial court's application of two enhancement factors.¹ Upon our review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Adrian Chick, Nashville, Tennessee (on appeal), and Paul J. Walwyn, Madison, Tennessee (at trial), for the appellant, Reginald J. McGill.

Robert E. Cooper, Jr., Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Dan M. Alsobrooks, District Attorney General; and Robert S. Wilson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

In October 2003, a Cheatham County Grand Jury returned a five-count indictment against the appellant, charging him with two counts of especially aggravated kidnapping, two counts of aggravated assault, and one count of felony evading arrest. Thereafter, the appellant entered a guilty

¹ This case is before us pursuant to a delayed appeal which was granted after the appellant filed for post-conviction relief.

plea to a single count of aggravated kidnapping in exchange for the dismissal of the remaining counts.²

At the guilty plea hearing, the State did not set out a factual basis for the guilty plea. The trial court asked the appellant to relate his version of events, and the appellant answered as follows:

Well, in the process of having my charge partner, Mr. [Maurice] Murphy, to drive me to Johnny [Bryant's] home. I had walked up to the porch, knocked on the door and the daughter had come to the door. She went back and got the mother[, the victim, Heather Bryant]. My charge partner then was a few feet behind me; and she came to the door. What is happening? She answered the door; and we had talked. I had asked her, was Johnny in? She explained to me that no Johnny lived there; and I was explaining to her why I was there.

Mr. Murphy had entered the home, therefore, Mr. Johnny, her husband, I heard an[] automatic being locked and loaded, one shot. Therefore, we three run from the doorway to the backside of the driveway; and Mr. Johnny stood in the driveway and my charge partner was on the side of the house. Me and Ms. Heather was on the side of her car; and Mr. Murphy shot from around the side of the house. Mr. Bryant – I stood up from behind Ms. Heather and Mr. Bryant shot at me with Ms. Heather; and backing up to the car; and Mr. Johnny had shot twice.

Mr. Murphy had ran from the side of the house to the car and got in the passenger's side, left the door open, started the car, and me and Ms. Heather made our way to the car.

At the conclusion of his recitation of facts, the appellant admitted that he took Mrs. Bryant from the house against her will.

At the plea hearing, the appellant acknowledged that it was his intention to plead guilty to the aggravated kidnapping of Mrs. Bryant in exchange for the dismissal of the remaining charges. The appellant also acknowledged that no agreement had been reached regarding sentencing. Additionally, the appellant conceded that as part of the plea agreement, he agreed that two enhancement factors were to be applied by the trial court. Namely, the appellant agreed to the application of enhancement factor (3), that “[t]he offense involved more than one (1) victim,” and enhancement factor (9), that the appellant “possessed or employed a firearm . . . during the commission of the offense.”

² The written plea agreement is not in the record on appeal.

At the sentencing hearing, the State submitted the appellant's presentence report. The report reflected that the appellant had previously been found guilty of simple possession of cocaine, driving on a revoked license, unlawful possession of a weapon, and a traffic offense.

Travis Walker, a detective who apprehended the appellant, testified at the sentencing hearing that on the day of the incident police received a call regarding a home invasion and kidnapping. Police were given a description of the vehicle driven by the suspects. Detective Walker was nearby, and he proceeded to the area. Shortly thereafter, he saw the vehicle driven by the appellant and his co-defendant, Murphy. Detective Walker pursued the vehicle, activating his emergency equipment. The appellant's vehicle gained speed. Another officer, Randy Anderson, joined in the pursuit of the appellant's vehicle. The appellant's vehicle almost hit Officer Anderson's vehicle "head-on." Detective Walker testified, "When we got to the crossroad Highway 41A and 49, I did the pit maneuver which my vehicle bumps his vehicle, spins out." The appellant's vehicle went off the road, and, as the vehicle was coming to a stop, the passenger threw two handguns from the vehicle. After the vehicle came to a stop, Detective Walker and Officer Anderson removed Murphy, Mrs. Bryant, and the appellant from the vehicle. Mrs. Bryant was "very shaken up" and "scared to death." She told Detective Walker, "I didn't care if we crashed this, I wanted to get out of that car." Police discovered that one of the guns thrown from the vehicle had been fired and the other had "jammed" when someone had attempted to fire it.

Heather Bryant, the victim of the kidnapping, testified that she and her family were traumatized by the actions of the appellant and Murphy. She stated that she, her husband, and her three minor daughters were in the residence during the incident. Mrs. Bryant said that the ages of her daughters were six years, five years, and a year and a half. Mrs. Bryant said that as a result of the incident, she has a bullet hole in a wall and a cabinet in her home. Mrs. Bryant did not recall who fired a gun during the incident, but she knew the appellant "had me around my neck [from behind] and I had my hands over my face." Mrs. Bryant asserted that she and the appellant were outside the residence when the weapon was fired.

Johnny Carol Bryant, Heather Bryant's husband, testified that on the day of the incident, he saw two black men he did not recognize back a car into his driveway. The men got out of the vehicle and walked toward the front door. The day was hot, but they were dressed in "long clothes" and were "all in black." Mr. Bryant thought "something was fishy," so he told Mrs. Bryant to go to the door to see who it was. In the meantime, Mr. Bryant got his shotgun. When he returned, the appellant had Mrs. Bryant in a choke hold, using a pistol to choke her. When the appellant saw Mr. Bryant coming closer with the shotgun, he put Mrs. Bryant in front of himself as a shield against potential gunfire and dragged her outside. Mr. Bryant was going to help Mrs. Bryant when "one of them started shooting." Mr. Bryant noticed that his baby daughter was on the table where Mrs. Bryant had been feeding her before the men arrived. He got the baby and instructed his other two daughters to get in a bedroom closet. Mr. Bryant then called the police.

The appellant's wife, Shirley Ann Boyd McGill, testified that she and the appellant had been married for five years. She said that after the appellant's arrest and incarceration, she lost her home

and her vehicle. She stated that the appellant was not employed at the time of the crime; he “just did home improvement stuff.” In order to supplement their income, the appellant raised pit bull dogs. She said that the appellant was “real apologetic” about the trauma he caused the Bryant family and his own family.

The appellant’s niece, Laquenta Renee Bryant, testified that she believed that the appellant was a “man of integrity.” She thought that for him to have committed this crime, he must have been in the wrong place at the wrong time while associating with the wrong people. She said that the appellant is not a violent person and always treated his family with care.

The appellant testified that he went to Mr. Bryant’s residence because he had met Mr. Bryant previously and knew Mr. Bryant also bred pit bull dogs. The appellant explained that he went to Mr. Bryant’s residence because he was looking for a male pit bull puppy. The appellant said that he did not have a weapon when he approached the Bryants’ residence. The appellant reiterated the version of events he had posited at the plea hearing. During his recitation of facts, the appellant asserted that Murphy shot into the Bryants’ residence “from the side of the home – from the outside in.”

The appellant stated that when he and Murphy left the Bryants’ residence, Murphy was driving the vehicle and the appellant was in the passenger seat. Before Detective Walker “pitted” the vehicle during the pursuit, the appellant was holding two handguns outside the vehicle. When the vehicle was “pitted,” the appellant hit his head on the roof of the vehicle and the guns flew out of his hands. The appellant acknowledged that he never asked Murphy to stop the vehicle and allow Mrs. Bryant to get out of the vehicle; instead, he asked Murphy to take him to Nashville. He explained, “I already figured it was basically [almost] done and over with to get me to Nashville, . . . I figured being here in this county, I had already figured that – hey, two blacks being down here that it was going to be a hanging down here.” The appellant expressed his remorse for the crime.

The trial court applied three enhancement factors. First, the court found that a firearm was used in the commission of the crime. Second, the court found that more than one victim was involved in the crime. Third, the court found that the appellant had a previous criminal history consisting of misdemeanor convictions. Weighing these factors, the court determined that the appellant should be sentenced to twelve years, the maximum in his range. On appeal, the appellant contests the application of the two enhancement factors to which he agreed, namely that more than one victim was involved in the crime and that a handgun was used in the commission of the offense.

II. Analysis

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in

his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

The appellant complains that the trial court incorrectly applied two enhancement factors, namely that more than one victim was involved in the crime and that a handgun was used in the commission of the offense. The State responds that the appellant's appeal should be dismissed because he failed to timely file a notice of appeal. The State contends that if this court entertains the appeal, the issue should be waived because the appellant agreed in his plea agreement to the application of the contested enhancement factors. Finally, the State argues that the enhancement factors were correctly applied.

Initially, we will address the State's contention that the appellant's notice of appeal was late-filed.³ As we noted earlier, on January 23, 2006, after the appellant filed a petition for post-conviction relief, the trial court granted the appellant a delayed appeal. See Tenn. Sup. Ct. R. 28 §9(D)(1)(a); Tenn. Code Ann. § 40-30-113 (2006). On March 10, 2006, the appellant filed a notice of appeal.

Tennessee Rule of Appellate Procedure 3(b) provides that a criminal defendant may appeal to this court following a guilty plea if "there was no plea agreement concerning the sentence." Rule 4(a) of the Tennessee Rules of Appellate Procedure instructs that "the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from; however, in all criminal cases the 'notice of appeal' document is not jurisdictional and the filing of such document may be waived in the interest of justice." The Advisory Commission Comments to Rule 4 maintain that "[t]hirty days is sufficient time particularly in light of the fact that a party is required to do nothing to initiate the appellate process except file and serve notice of appeal." Tennessee Code Annotated section 40-30-113(b) provides that "[a]n order granting proceedings for a delayed appeal shall be deemed the final judgment for the purposes of review." Accordingly, for his notice of appeal to be timely, the appellant should have filed a notice of appeal within thirty days of the trial court's order granting a delayed appeal.

The State correctly observes that the appellant's notice of appeal was filed beyond the thirty-day time period. However, a notice of appeal "is not jurisdictional and the filing of such document may be waived in the interest of justice." Tenn. R. App. P. 4(a). In the instant case, we conclude that waiving the timely filing requirement serves the interest of justice; therefore, we will examine the appellant's complaints on the merits.

³ The appellant did not respond to the State's contention that the notice of appeal was late-filed.

The trial court found that three enhancement factors applied to the appellant: (1) that the appellant “has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range”; (3) “[t]he offense involved more than one (1) victim”; and (9) the appellant “possessed or employed a firearm . . . during the commission of the offense.” Tenn. Code Ann. § 40-35-114(1), (3), and (9) (2006). The appellant does not contest the application of enhancement factor (1); however, he argues that the trial court incorrectly applied enhancement factors (3) and (9).

As we noted earlier, as part of the plea agreement the appellant agreed to the application of enhancement factors (3) and (9). This court has previously stated that offender classifications “are non-jurisdictional and legitimate bargaining tools in plea negotiations under the Criminal Sentencing Reform Act of 1989.” Bland v. Dukes, 97 S.W.3d 133, 134 (Tenn. Crim. App. 2002). Moreover, this court has previously stated that a defendant “does not have the right to appeal after entering a valid plea of guilty and being sentenced pursuant to the terms of a plea bargain agreement.” State v. McKissack, 917 S.W.2d 714, 716 (Tenn. Crim. App. 1995). Therefore, if a defendant pleads guilty to a given sentencing range, regardless of whether there is a factual basis for the imposition of that range, the complaint is waived by the knowing and voluntary plea. See State v. Mahler, 735 S.W.2d 226, 228 (Tenn. 1987). We conclude that, likewise, an offender may, as part of a plea agreement, agree to the application of enhancement factors, regardless of the existence of a factual basis for the application of the enhancement factors.

In the instant case, the appellant, as part of his plea agreement, agreed to the application of enhancement factors (3) and (9), essentially conceding that there was a factual basis for the application of those factors. Thus, there was no need for the State to produce additional proof to support the application of those enhancement factors. Accordingly, we conclude that because the appellant conceded the factual basis for enhancement factor (3), the trial court did not err in finding that enhancement factor applicable. However, we do find error with the application of enhancement factor (9).

The appellant was charged with the especially aggravated kidnapping of Mrs. Bryant, but he pled guilty to the lesser-included offense of aggravated kidnapping. On appeal, the appellant contends that enhancement factor (9) is inherent in the offense of aggravated kidnapping. In response, the State argues that the “use of a weapon is not necessarily an element of that offense.” The State further argues that the appellant could have been convicted of aggravated kidnapping “under another theory of the offense and still agree to the use of the enhancement factor.”

Ordinarily, an enhancement factor may be applied “[i]f appropriate for the offense and if not already an essential element of the offense.” See Tenn. Code Ann. § 40-35-114. The State correctly asserts that aggravated kidnapping may be committed without employing a handgun. However, in the instant case, the indictment specifically alleged that the appellant committed especially aggravated kidnapping, and therefore the lesser-included offense of aggravated kidnapping, by using a handgun. Therefore, regardless of any proof presented by the State or conceded by the appellant, the trial court was statutorily proscribed from using factor (9) to enhance the appellant’s sentence.

Despite the trial court's error in finding enhancement factor (9) applicable, the remaining enhancement factors serve to justify the sentence imposed by the trial court. Accordingly, the appellant is not entitled to a modification of his sentence.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE